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U.S. COURT OF APPEALS

Appeal No: 16-56647

MAR 22 2017

USDC 5:16-cv-00952-JGB-SP

FILED	_____	_____
DOCKETED	_____	_____
	DATE	INITIAL

In

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Yoana A. Kiprilov,
Appellant-Plaintiff,

-v.-

National Board of Medical Examiners,
Appellee-Defendant

Appeal from the United States District Court,

Central District of California

District Court No: 5:16-cv-00952-JGB-SPx

Hon. Jesus G. Bernal, Hon. Sherry Pym

Appellant's Statement in defend of the Appeal

Appellant's Addendum to the Appeal Statement

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Pro se party

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ADDENDUM
TO THE STATEMENT THAT THE APPEAL SHOULD GO FORWARD,
BASED ON RECENT CHANGE OF CIRCUMSTANCES
(Filed by the Pro se Appellant)

Appellant respectfully ~~submits this Addendum~~, since at the time of filing the

Statement (March. 6, 2017) she did not have a passing score given by the

Appellee-NBME (received on March 8, 2017- “the last score”). And:

1.Appellee’s response is untimely (filed 11 days later, not within 10 days). Also,
NBME attempts to introduce the last score as a new evidence, but the lawsuit
concerns NBME’s breach and deception based only on the previous two exam
results/attempts (not the last-third one). All three exam results are completely
different. The claim in this lawsuit was that **the exam is not reliable/consistent**
(i.e. gives every time entirely different results) and, **if** this new score is
considered, then NBME’s breach is proven, since:

“A test with poor reliability...might result in very different scores for the
examinee across the two test administrations. Reliability... It has to do with the
consistency”.

If the 2017-score is considered (which is a new evidence proving the “plausible”
claim), **another new evidence should also be considered**. Namely, recently the
American Medical Association (House of Delegates) has passed a resolution to
end this exam-Step 2 CS- for US-graduates, after the 2016-petition signed by

more than 17,000 US-graduates. Hon. Bernal was notified about the petition, even mentioned it in the rulings. But the court disregarded that fact, as well as that **NBME did not dispute their breach based on reliability issues, and also that NBME admit officially that their current unreliable scoring policy and the unreliable exam “pose risk to the public”. This is a mistake of law and facts.**

Appellant requested in her complaints for “**compensatory**” and “punitive damages” based on NBME’s wrongdoing **in 2015** – i.e. NBME giving her two contradictory scores falsely claiming that the scores are reliable/valid, and NBME’s refusal to combine these two scores. Thus, Appellant’s still suffered career and financial damages, irreversible (even by the last 2017-score), with adverse future consequences- (please see the Statement). Thus, the ruling should be reviewed and reversed by the Ninth Circuit, considering the damages.

Even if the new evidence/ the last 2017-score is considered, then only the claim for the so-called “specific performance” (granting passing result based on the 2015-scores) could be omitted, but the compensatory and punitive damages should still be considered and cannot be omitted because of the already suffered irreversible damages – 3 years lost in unemployment as a resident physician, \$ 4,600 given to NBME for this unreliable exam. As well as the Appellant’s future career and financial damages.

2. NBME was served personally, electronically (email), and via mail on Mar. 6, 2017 -FRAP 25(c)(4). NBME filed **untimely** response **11** days later (Mar. 17, 2017, 12:05 pm) violating FRAP-25 (a)(2)(A), and served untimely the Appellant (violating FRAP 25). This is not in the timeframe provided by the law and the court (“within 10 days”-by/on March **16**, 2017). NBME’s untimely filed

meritless/frivolous response, contradicting the “de novo review” as a widely accepted judicial approach for appeals, and the attempt to introduce new evidence should be ignored.

3. It was stated in another case decided by Hon. Bernal (in 2016), and currently appealed in the Ninth Circuit (“Center For Biological Diversity et al v. U.S. Forest Service et al, 5:15-cv-02098), by Mr. Eddie Kurtz, exec. director of the California-based Courage Campaign Institute that: “*This appeal challenges a justice system that lets massive corporations play by a different set of rules than the rest of us*”. Similarly, NBME is also such a “massive” corporation, which won the case (but not in accordance with the law /facts presented and the evidence-based research studies/expert’s conclusions). **This** appeal here makes the same “challenge” as in the **abovementioned** appeal, since both cases were decided (in 2016) by the same judge- Hon. J.G. Bernal. In our case, there are multiple mistakes of law and facts, undisputed (by NBME) breach, regardless of the new evidence. And, the claims are not “conclusory”, but rather “conclusive”.

CONCLUSION:

Although NBME is trying to introduce **untimely new** evidence (to avoid justice), it is unrelated to claims for compensatory and punitive damages based on their (2015) misconduct. Even **if** the new evidence/last score is considered, then only the claim for the so-called “specific performance” (granting passing result

based on the 2015-scores) could be omitted, **but the compensatory and punitive damages should still be considered and cannot be omitted because of the already suffered irreversible damages, as well as the Appellant’s future career and financial damages. NBME’s claims during the entire lawsuit were meritless and unsupported by evidence and by the law, and should be ignored. The court’s ruling should be reversed.**

Since NBME blackmailed Appellant to retake the exam and claimed in their research studies that with time the skills can be lost (and Hon. Bernal’s ruling supported NBME’s wrongdoing), Appellant retook the exam. Although Appellant is not allowed to practice and has no access to patients, surprisingly her skills to communicate with patients were not lost in 2017 and were the same (as seen in the similarity between her 2015 and 2017 passing scores on CIS and ICE parts). The last time, NBME gave her an “overall passing outcome”. Shortly put, **NBME and ECFMG did not have reasonable grounds to refuse to grant the Appellant an overall passing outcome in 2015,** but due to their greediness for

more money, they blackmailed her for another \$1,535 and a third attempt. Thus, it is highly likely that the Appellant will never be able to get a residency position due to the requirements (the exam should be passed on the first or the second attempt, and the time since graduation should be less than five years). It has been already 7 years, since in 2015 NBME refused to recognize Appellant's passing

results (on each part of the exam), and in 2016 Hon. Bernal refused to grant "specific performance". This caused more damages to the Appellant. Finally, the court did not deny that this practice is dangerous to the public, that NBME's wrongdoing is a breach (based on the facts and reliability claims). The court's misinterpreted Appellant's "desires" (... "to change the scoring policy"), but such claims about her "desires" have never been made before the court. The court ruled on a non-existent claim ("desires") and on its own misinterpretation on someone's desires, not on the facts and real claims in the Complaints and the real statements made by the Appellant. By not following the law, the mistakes of facts and law, and the abuse of discretion, the lower court allowed NBME to cause more damages. The court did not have the legal and the factual grounds to favor NBME. Thus, justice has not been served, the ruling should be reviewed and reversed.

Appellant respectfully requests the Statement and the Addendum to be considered.

Date: 03/18/2017

Respectfully submitted by the Appellant

(in Pro se):

